UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

UNITED STATES OF AMERICA Plaintiff, and SIERRA CLUB Intervenor-Plaintiff, v. DTE ENERGY COMPANY, and DETROIT EDISON COMPANY, Defendants.	Case No. 2:10-cv-13101-BAF-RSW Honorable Bernard A. Friedman Magistrate Judge R. Steven Whalen

SIERRA CLUB'S MOTION FOR
CERTIFICATION OF PARTIAL FINAL JUDGMENT

Pursuant to Fed. R. Civ. P. 54(b), Intervenor-Plaintiff Sierra Club respectfully moves this Court for certification of partial final judgment. Sierra Club seeks final judgment on the Plaintiffs' Clean Air Act claims regarding Unit 2 of the Monroe Power Plant in Monroe, Michigan. This Court granted summary judgment on these claims in its March 3, 2014 Opinion and Order. ECF No. 196. Certification under Rule 54(b) is appropriate for the reasons set forth in the accompanying memorandum of law.

Counsel for Sierra Club conferred with counsel for the United States and counsel for Defendants about this motion. Defendants declined to take a position on this motion in advance of its filing. The United States does not oppose Sierra Club's motion, so long as judgment is not granted with respect to the United States' claims at this time. As explained further in the United States' separate filing, the United States is currently considering whether to seek a Rule 54(b) final judgment for purposes of appeal. Sierra Club believes that it would be in the best interests of all parties for both Rule 54(b) motions to be resolved at the same time.

Doing so would avoid the possibility that the Plaintiffs' appeals might proceed on different timeframes.[1]

Respectfully submitted,

s/ Shannon Fisk
Shannon Fisk - IL Bar # 6269746
Earthjustice
1617 John F. Kennedy Blvd. Suite 1675
Philadelphia, PA 19103
(215) 717-4522
sfisk@earthjustice.org

Nicholas J. Schroeck - MI Bar # P70888
Great Lakes Environmental Law Center
440 Burroughs St. Box 70
Detroit, MI 48202
(313) 820-7797
nschroeck@wayne.edu

Counsel for Plaintiff-Intervenor Sierra Club

Dated: April 2, 2014

[1] Out of an abundance of caution, Sierra Club is filing this Rule 54(b) motion now to ensure that its motion is timely. Although Rule 54(b) does not set forth a firm deadline, and the Sierra Club is not aware of any Sixth Circuit case that sets a deadline for filing a Rule 54(b) motion, the Seventh Circuit has suggested that such motions should generally be filed within 30 days of the district court's order. *See Schaefer v. First Nat'l Bank of Lincolnwood*, 465 F.2d 234 (7th Cir. 1972); *see also* EPA & Illinois EPA's Motion for Extension of Time to File Rule 54(b) Motion, *United States v. Mw. Generation, LLC*, No. 1:09-cv-05277 (N.D. Ill. May 6, 2011), ECF No. 146; Ruling on Motion for Extension of Time, *United States v. Mw. Generation, LLC*, No. 1:09-cv-05277 (N.D. Ill. May 12, 2011), ECF No. 149 (granting EPA and Illinois EPA's extension request).

CERTIFICATE OF SERVICE

I hereby certify that the foregoing pleading and supporting documents were served via ECF on all counsel of record.

s/ Shannon Fisk
Counsel for Plaintiff-Intervenor
Sierra Club

UNITED STATES DISTRICT COURT
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UNITED STATES OF AMERICA Plaintiff, and SIERRA CLUB Intervenor-Plaintiff, v. DTE ENERGY COMPANY, and DETROIT EDISON COMPANY, Defendants.	Case No. 2:10-cv-13101-BAF-RSW Honorable Bernard A. Friedman Magistrate Judge R. Steven Whalen

MEMORANDUM IN SUPPORT OF SIERRA CLUB'S MOTION FOR CERTIFICATION OF PARTIAL FINAL JUDGMENT

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Gen. Acquisition, Inc. v. GenCorp, Inc., 23 F.3d 1022 (6th Cir. 1994)

Planned Parenthood Sw. Ohio Region v. DeWine, 696 F.3d 490 (6th Cir. 2012)

ISSUE PRESENTED

QUESTION: Should this Court certify its March 3, 2014 Opinion and Order as a partial final judgment, thereby allowing an immediate appeal of the Court's Order?

ANSWER: Yes

Pursuant to Fed. R. Civ. P. 54(b), Intervenor-Plaintiff Sierra Club respectfully moves this Court for certification of partial final judgment. Sierra Club seeks final judgment on the Plaintiffs' New Source Review ("NSR") claims regarding Unit 2 of the Monroe Power Plant in Monroe, Michigan (the "Monroe Unit 2 claims"). The Court granted summary judgment on these claims in its March 3, 2014 Opinion and Order. ECF No. 196. Rule 54(b) certification is appropriate because the Court's Order disposed of fewer than all of the claims in this case, and because there is no just reason for delaying appellate review. *See Gen. Acquisition, Inc. v. GenCorp, Inc.*, 23 F.3d 1022, 1026-28 (6th Cir. 1994). This Court should therefore issue final judgment on the Monroe Unit 2 claims.

BACKGROUND

The United States originally brought this Clean Air Act ("CAA") enforcement case based on a construction project that Defendants DTE Energy Co. and Detroit Edison Co. (collectively, "Defendants" or "DTE") performed at Unit 2 of the Monroe Power Plant. That project, which began in March 2010, took approximately three months to complete. ECF No. 160 at 8. The United States alleged that this construction project constituted a "major modification" under the CAA, thereby triggering the need for a preconstruction permit under the CAA's Prevention of Significant Deterioration ("PSD") and Nonattainment NSR programs. The United States further alleged that DTE's failure to obtain a permit

violated the CAA. *See generally* Compl. ¶¶ 49-58, ECF No. 1. Sierra Club subsequently intervened as a plaintiff, likewise asserting claims that focused on Unit 2 of the Monroe Power Plant. ECF Nos. 35, 64.

On August 13, 2011, this Court granted Defendants' motion for summary judgment on the Monroe Unit 2 claims. ECF No. 160. The Court held that DTE was not required to obtain a permit prior to its renovation of Unit 2, and that "a determination of whether the projects at issue constitute a major modification is premature." *Id.* at 10. The Court concluded that the United States could "pursue NSR enforcement if and when post-construction monitoring shows a need to do so." *Id.*

The Sixth Circuit reversed, holding that a utility seeking to modify an electric generating unit must "make a preconstruction projection of whether and to what extent emissions from the source will increase following construction," and that such projections may be "subject to an enforcement action by EPA to ensure that the projection is made pursuant to the requirements of the regulations." *United States v. DTE Energy Co.*, 711 F.3d 643, 644, 652 (6th Cir. 2013). The Sixth Circuit remanded so this Court could determine whether DTE had "adhered to EPA's regulations governing preconstruction emission projections prior to renovating [Unit 2]." ECF No. 196 at 2.

While this case was on remand, both the United States and Sierra Club moved for leave to file amended complaints. *See* ECF No. 184, 186. If granted, these motions would allow Plaintiffs to add NSR claims related to several additional construction projects that occurred at DTE's coal-fired power plants. In addition to the original Monroe Unit 2 claims, the Sierra Club's amended complaint would add new claims involving Units 1 and 2 of the Belle River Power Plant, Unit 3 of the River Rouge Power Plant, and Unit 9 of Trenton Channel Power Plant. *See generally* Sierra Club's Proposed Am. Compl., ECF No. 186-1. The United States' amended complaint would add new claims involving Belle River Units 1 and 2, Trenton Channel Unit 9, and Monroe Units 1, 2, and 3. *See generally* United States' Proposed Am. Compl., ECF No. 184-2. These new claims all involve different construction projects, performed at different times, than the project which gave rise to the Monroe Unit 2 claims. And with a single exception, all of these new claims involve projects at coal-fired units other than Monroe Unit 2.[2] Defendants do not oppose any of the new claims that the United

[2] As noted above, the United States' amended complaint seeks to add a new claim relating to Monroe Unit 2. *See* ECF No. 184-2 ¶¶ 79-83. This new claim, however, is based on a distinct renovation project that was completed approximately five years before the project that gave rise to the original Monroe Unit 2 claims. *Compare id.* ¶¶ 69-78 (original Monroe Unit 2 claims, based on 2010 construction project) *with id.* ¶¶ 79-83 (seeking to add new claim based on 2005 project).

States seek to add, ECF No. 187 at 3, and they oppose the addition of only one of the new claims that Sierra Club seeks to add. ECF No. 189 at 1-2.

Meanwhile, Defendants filed a renewed motion for summary judgment, which this Court granted in an Opinion and Order issued on March 3, 2014. *See* ECF No. 196 (hereinafter, "Summary Judgment Order"). In this Order, the Court concluded that the United States was taking Defendants "to task over *the extent* to which they relied upon the demand growth exclusion to justify their projections," and in doing so was impermissibly "second-guessing 'the making of [preconstruction emission] projections.'" *Id.* at 3 (quoting *DTE Energy Co.*, 711 F.3d at 649). The Court held that the government had failed to establish that "defendants violated the regulations governing preconstruction emission projections," and this CAA enforcement action was therefore premature. *Id.* at 3, 4. Sierra Club now seeks Rule 54(b) certification of the Summary Judgment Order.

LEGAL STANDARD

Federal Rule of Civil Procedure 54(b) empowers district courts to "direct entry of a final judgment as to one or more, but fewer than all, claims . . . if the court expressly determines that there is no just reason for delay." Rule 54(b) thus "permits immediate appellate review of a district court's judgment even though the

lawsuit contains unresolved claims." *GenCorp, Inc. v. Olin Corp.*, 390 F.3d 433, 442 (6th Cir. 2004).

To certify a final judgment under Rule 54(b), a district court must make two independent findings. First, the court "must expressly 'direct the entry of final judgment as to one or more but fewer than all the claims or parties' in a case." *Gen. Acquisition, Inc. v. GenCorp, Inc.*, 23 F.3d 1022, 1026 (6th Cir. 1994) (citations omitted).

Second, the district court "must 'express[ly] determin[e] that there is no just reason' to delay appellate review." *Id.* at 1026. In making that determination, the court should consider a nonexhaustive list of factors, including "(1) the relationship between the adjudicated and unadjudicated claims; (2) the possibility that the need for review might or might not be mooted by future developments in the district court; (3) the possibility that the reviewing court might be obliged to consider the same issue a second time; (4) the presence or absence of a claim or counterclaim which could result in set-off against the judgment sought to be made final; (5) miscellaneous factors such as delay, economic and solvency considerations, shortening the time of trial, frivolity of competing claims, expense and the like." *Id.* at 1030 (quotation marks and citations omitted). "Depending upon the facts of the particular case, all or some of the above factors may bear upon the propriety of the trial court's discretion in certifying a judgment as final

under Rule 54(b)." *Corrosioneering, Inc. v. Thyssen Envt'l Sys., Inc.*, 807 F.2d 1279, 1283 (6th Cir. 1986) (citation omitted).

In determining whether Rule 54(b) certification is proper, the district court's discretion must be "exercised in the interest of sound judicial administration," taking into account "administrative interests as well as the equities involved." *Curtiss–Wright Corp. v. Gen. Elec. Co.*, 446 U.S. 1, 8 (1980). And when certifying an order under Rule 54(b), the district court "must clearly explain why it has concluded that immediate review of the challenged ruling is desirable." *Gen. Acquisition*, 23 F.3d at 1026; *Corrosioneering*, 807 F.2d at 1284.

ARGUMENT

I. RULE 54(B) CERTIFICATION IS APPROPRIATE.

This Court should certify the Summary Judgment Order as a partial final judgment under Fed. R. Civ. P. 54(b) because both requirements of Rule 54(b) are satisfied here. First, the Monroe Unit 2 claims, on which this Court granted summary judgment, are distinct from the remaining claims in this litigation. Thus, the Court can "expressly direct the entry of final judgment as to one or more but fewer than all of the claims in the case." *GenCorp*, 390 F.3d at 442 (quotation marks and citation omitted). Second, there is no just reason to delay appellate review. All of the relevant factors weigh in favor of Rule 54(b) certification here. *See Gen. Acquisition*, 23 F.3d at 1030. Permitting appellate review of the

Summary Judgment Order would promote judicial economy by clarifying the governing legal standards, potentially streamlining the scope of discovery, and by foreclosing the possibility that this Court may need to resolve the same issues twice. Because the standards for Rule 54(b) certification are met in this case, the Court should grant partial final judgment on the Monroe Unit 2 claims.

A. The Court's Order Disposes of Fewer Than All the Claims in This Case.

For a district court order to be certified under Rule 54(b), the order must "dispose[] of one or more but fewer than all of the claims . . . in a multi-claim . . . action." *Gen. Acquisition*, 23 F.3d at 1026-27. Rule 54(b) certification is proper here, because the Court's Summary Judgment Order disposed of a distinct subset of the claims at issue in this case.

To determine whether an order has disposed of fewer than all claims, courts in the Sixth Circuit generally apply "the operative facts test, which defines a claim under Rule 54(b) '[as] the aggregate of operative facts which give rise to a right enforceable in the courts . . . ." *Planned Parenthood Sw. Ohio Region v. DeWine*, 696 F.3d 490, 500 (6th Cir. 2012) (citing *GenCorp*, 390 F.3d at 442) (quotation marks and alterations omitted); *see also Gen. Acquisition*, 23 F.3d at 1028.

The operative facts test is satisfied here, because if this Court allows Plaintiffs to amend their complaints (*see* ECF Nos. 184, 186), the claims remaining in this litigation will be separate and distinct from the claims dismissed in the

Summary Judgment Order. The "aggregate of operative facts" that gave rise to the dismissed claims was a construction project that DTE performed at Monroe Unit 2 from March through June 2010. ECF No. 160 at 10; ECF No. 1 ¶¶ 46, 49-58. By contrast, the new claims that would be added in Plaintiffs' amended complaints involve different construction projects, performed at different times, and which (with one exception) involved different coal-fired units. More specifically, Plaintiffs' amended complaints seek to add new NSR claims arising out of:

- a 2008 construction project at Unit 1 of the Belle River Power Plant (ECF No. 184-2 ¶¶ 89-98; ECF No. 186-1 ¶¶ 82-91);

- a 2007 construction project at Belle River Unit 2 (ECF No. 184-2 ¶¶ 99-103; ECF No. No. 186-1 ¶¶ 92-96);

- a 2007 construction project at Unit 9 of the Trenton Channel Power Plant (ECF No. 184-2 ¶¶ 104-08; ECF No. 186-1 ¶¶ 102-06);

- a 2005 construction project at Unit 3 of the River Rouge Power Plant (ECF No. 186-1 ¶¶ 97-101);

- a 2006 construction project at Monroe Unit 1 (ECF No. 184-2 ¶¶ 64-68);

- a 2005 construction project at Monroe Unit 2 (ECF No. 184-2 ¶¶ 79-83); and

- a 2004 construction project at Monroe Unit 3 (ECF No. 184-2 ¶¶ 84-88).

For each such construction project, DTE submitted different projections of post-project emissions and differing levels of post-project emissions increases have occurred.

Plaintiffs' new claims thus involve distinct construction projects that DTE performed at different times. Because the remaining claims arise from a different "aggregate of operative facts" than the Monroe Unit 2 claims, Plaintiffs satisfy the operative facts test.[3] Moreover, Plaintiffs' new claims give rise to distinct legal injuries, each of which provides an independent basis for injunctive relief and civil penalties. ECF No. 184-2 at 32-33, ECF No. 186-1 at 31 (relief requested by Plaintiffs); *see generally Planned Parenthood*, 696 F.3d at 502 (plaintiffs' claims

[3] The operative facts test can be met even when the underlying facts of two claims are somewhat intertwined. *See Planned Parenthood*, 696 F.3d at 501 (noting that in *GenCorp* the "aggregate set of operative facts" of two claims was "wholly distinct," even though both claims related "to the same improper toxic waste disposal"). Here, however, the operative facts test is easily satisfied because Plaintiffs' remaining claims involve distinct construction projects, performed at different times, for which DTE submitted different projections of post-project emissions, and which resulted in differing levels of post-project emissions increases.

are separate where "each count involves distinct facts relating to separate injuries"). Because the Summary Judgment Order "provided an 'ultimate disposition'" of the Monroe Unit 2 claims, *GenCorp*, 390 F.3d at 443 (citation omitted), Plaintiffs satisfy the first requirement for Rule 54(b) certification.

B. There is No Just Reason to Delay Appellate Review.

The second requirement for Rule 54(b) certification is that "the district court must expressly determine that there is no just reason to delay appellate review." *Planned Parenthood*, 696 F.3d at 500 (citation omitted). Here, there is no just reason for delay because all of the relevant factors favor entry of final judgment on the Monroe Unit 2 claims. *See Gen. Acquisition*, 23 F.3d at 1030 (listing factors); *see also In re: Seizure of $143,265.78*, 616 F. Supp. 2d 708, 709 (E.D. Mich. 2009) (granting 54(b) certification where the factors are either neutral or favor partial final judgment).

First, the relationship between the adjudicated and unadjudicated claims weighs in favor of Rule 54(b) certification. As an initial matter, the claims that Plaintiffs seek to add arise from different events than the Monroe Unit 2 claims. *See supra* at 8-10. And where, as here, the "the relationship between the adjudicated and unadjudicated claims is sufficiently distinct and independent," this factor "weigh[s] in favor of certifying judgment as final." *Gen-Pa Bigli Islem Ltd. Liab. Co. v. Virtual Tech., Inc.*, 169 F.R.D. 84, 87 (E.D. Mich. 1996); *see also*

Planned Parenthood, 696 F.3d at 503 (upholding Rule 54(b) certification based on, *inter alia*, "the separateness of the claims").

Moreover, immediate appellate review of the Monroe Unit 2 claims will promote judicial economy by ensuring that the remaining claims in this case are litigated efficiently. As noted above, Plaintiffs' amended complaint would add claims alleging that DTE violated the Clean Air Act by performing construction projects at several coal-fired power plants without first obtaining the necessary permits. Although the facts underlying these new claims are different from those at issue in the Monroe Unit 2 claims,[4] all of Plaintiffs' claims involve the same statutory framework. Like the Monroe Unit 2 claims, Plaintiffs' new claims would allege violations of the PSD and Nonattainment NSR provisions of the Clean Air Act. *Compare generally* ECF No. 184-2 ¶¶ 69-78, ECF No. 186-1 ¶¶ 72-81 (Monroe Unit 2 claims) *with* ECF No. 184-2 ¶¶ 64-68, 79-108, ECF No. 186-1 ¶¶ 82-106 (proposed new claims). The parties dispute the proper interpretation of these legal requirements and their application to DTE's construction projects. The

[4] The factual differences between these claims are potentially legally significant. One of the bases for this Court's summary judgment ruling was that emissions at Monroe Unit 2 did not increase in the first couple years following DTE's construction project. ECF No. 196 at 3-4; *see also* ECF No. 184 at 5; ECF No. 179 at 14-15. While Sierra Club disputes the Court's finding that there must be an actual post-project emissions increase before an NSR violation can occur, *see DTE Energy Co.*, 711 F.3d at 649, all of the proposed new claims involve situations where actual emissions increased in the wake of DTE's construction projects. ECF No. 184 at 5, 12-13; ECF No. 186 at 5.

resolution of these legal questions will affect how the remaining claims are litigated – including the scope of discovery, the need for and content of any summary judgment motion, and the legal and factual issues that may be presented at trial. By securing appellate review of these important legal questions now, before discovery on the new claims has started, Rule 54(b) certification will ensure that those claims are litigated efficiently. *See, e.g.*, *Liberte Capital Grp. LLC v. Capwill*, 148 Fed. Appx. 426, 432, 2005 WL 2062677 at *6 (6th Cir. Aug. 29, 2005) (affirming Rule 54(b) certification where the district court found that resolving an important legal issue "would expedite the entire litigation, and allow all the litigants to benefit by a swifter resolution of all claims"). The first factor therefore weighs heavily in favor of Rule 54(b) certification.

Second, partial final judgment is also appropriate because future developments in district court will not obviate the need for appellate review. *Gen. Acquisition*, 23 F.3d at 1030. If this Court does not certify its Summary Judgment Order, the parties will still need to litigate the Plaintiffs' remaining legal claims. And, once those claims have been fully litigated – after additional briefing, motions practice, and a possible trial – Sierra Club would still seek to appeal this Court's summary judgment ruling on the Monroe Unit 2 claims. Because delaying final judgment will not moot the need for appellate review of the Monroe Unit 2 claims, this factor weighs in favor of Rule 54(b) certification. *See also Planned*

Parenthood, 696 F.3d at 503 (upholding Rule 54(b) certification based on, *inter alia*, "the unlikelihood that the need for appellate review would be mooted by future developments").

Third, Rule 54(b) certification is also proper because immediate appellate review would not require the Sixth Circuit "to consider the same issue a second time." *Gen. Acquisition*, 23 F.3d at 1030. The Sixth Circuit's decision should provide further clarity on the meaning of U.S. EPA's NSR rules, and those rules' application to DTE's construction projects. The appellate court's ruling would not only affect the Monroe Unit 2 claims, but would also likely address many of the legal issues raised by Plaintiffs' remaining claims, all of which involve similar allegations. *See* ECF No. 184-2 ¶¶ 64-68, 79-108; ECF No. 186-1 ¶¶ 82-106. Because the Sixth Circuit would not need to consider those legal issues again, this factor weighs in favor of certification. *See, e.g.*, *Planned Parenthood*, 696 F.3d at 503 (upholding Rule 54(b) certification based on, *inter alia*, "the unlikelihood that the need for appellate review would be mooted by future developments").

By contrast, delaying appellate review could have an opposite effect: it could force *this* Court "to consider the same issue[s] a second time." *Gen. Acquisition*, 23 F.3d at 1030. If Plaintiffs' remaining claims are fully litigated before any appellate review, and if Plaintiffs prevail in their appeal, this Court may

need to reconsider claims it had previously disposed of. Rule 54(b) certification will thus minimize the risk of needless duplication.[5]

The remaining Rule 54(b) factors – "such as delay, economic and solvency considerations, shortening the time of trial, frivolity of competing claims, expense and the like," *Gen. Acquisition*, 23 F.3d at 1030 – also weigh in favor of certification. As explained above, immediate appellate review of the Summary Judgment Order will promote judicial economy by ensuring that Plaintiffs' remaining claims are litigated efficiently, and by avoiding the possibility that this Court may need to consider the same issues twice. And because the Sixth Circuit's decision would likely narrow the legal and factual issues in dispute regarding Plaintiffs' remaining claims, Rule 54(b) certification could shorten the length of trial and minimize expenses for the Court and parties. *See Planned Parenthood*, 696 F.3d at 503 (Rule 54(b) certification proper because of, *inter alia*, "the possibility that immediate appeal would shorten the time and expense of trial"); *Marcilis v. Redford Twp.*, 09-11624, 2011 WL 284466 at *4 (E.D. Mich. Jan. 25, 2011) (finding 54(b) certification appropriate where "judicial economy is best served by immediate appeal, rather than going to trial on Plaintiffs' one remaining

[5] The fourth factor that courts generally consider in Rule 54(b) motions, "the presence or absence of a claim or counterclaim which could result in set-off against 'the judgment sought to be made final," 23 F.3d at 1030, does not apply in this case.

claim and then appealing the outcome of that trial and the issues presented in the instant motion to only have a second trial that involves the same parties, witnesses, and exhibits").

Finally, the appropriateness of Rule 54(b) certification is underscored by the fact that in recent years two district courts have certified judgments under Rule 54(b) under circumstances analogous to those here. In *United States v. Cinergy Corp.*, a case involving NSR claims against several coal-fired power plants, the Southern District of Indiana entered partial final judgment on NSR claims at one plant, even though similar NSR claims had not been resolved for the other plants owned by the defendant. Entry of Partial Final Judgment, *United States v. Cinergy Corp.*, No. 99-cv-1693 (S.D. Ind. May 29, 2009), ECF No. 1747 (finding "no just reason for delay" and entering partial final judgment on plaintiffs' NSR claims involving three coal-fired units) (attached as Ex. A). Similarly, in *United States v. Midwest Generation*, the Northern District of Illinois entered partial final judgment on several NSR claims. Minute Entry, *United States v. Mw. Generation, LLC*, No. 09-cv-5277 (N.D. Ill. Nov. 3, 2011), ECF No. 167 (attached as Ex. B). The court found Rule 54(b) certification appropriate because, among other things, it "could avoid duplicative discovery, motion practice, and trials, and therefore promote the efficiency and fairness required under Rule 54(b)." *Id.* This Court should

similarly exercise its discretion by certifying the Summary Judgment Order for immediate appellate review.

CONCLUSION

For the foregoing reasons, this Court should certify partial final judgment of the Monroe Unit 2 claims under Fed. R. Civ. P. 54(b).

Respectfully submitted,

s/ Shannon Fisk
Shannon Fisk - IL Bar # 6269746
Earthjustice
1617 John F. Kennedy Blvd. Suite 1675
Philadelphia, PA 19103
(215) 717-4522
sfisk@earthjustice.org

Nicholas J. Schroeck - MI Bar # P70888
Great Lakes Environmental Law Center
440 Burroughs St. Box 70
Detroit, MI 48202
(313) 820-7797
nschroeck@wayne.edu

Counsel for Plaintiff-Intervenor Sierra Club

Dated: April 2, 2014

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

UNITED STATES OF AMERICA Plaintiff, and SIERRA CLUB Intervenor-Plaintiff, v. DTE ENERGY COMPANY, and DETROIT EDISON COMPANY, Defendants.	Case No. 2:10-cv-13101-BAF-RSW Honorable Bernard A. Friedman Magistrate Judge R. Steven Whalen

INDEX OF EXHIBITS

Exhibit	Description
A	Entry of Partial Final Judgment, *United States v. Cinergy Corp.*, No. 99-cv-1693 (S.D. Ind. May 29, 2009), ECF No. 1747.
B	Minute Entry, *United States v. Mw. Generation, LLC*, No. 09-cv-5277 (N.D. Ill. Nov. 3, 2011), ECF No. 167.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

UNITED STATES OF AMERICA, Plaintiff, STATE OF NEW YORK, *et al.*, Plaintiff-Intervenors, vs. CINERGY CORP., *et al.*, Defendants.	))))))))))	1:99-cv-1693-LJM-JMS

ENTRY OF PARTIAL FINAL JUDGMENT

By Memorandum Opinion & Order dated May 29, 2009, this Court found in favor of plaintiff, the United States of America, and plaintiff-intervenors, the States of New York, New Jersey and Connecticut, and the Hoosier Environmental Council and the Ohio Environmental Council, on their claims that defendants, Cinergy Corp., PSI Energy, Inc., and the Cincinnati Gas & Electric Company, violated the New Source Review provisions of the Clean Air Act with respect to the projects on the Wabash River unit 2, 3, and 5, and Ordered certain injunctive relief. There being no just reason for delay, partial final judgment is entered on those claims in accordance with said Memorandum Opinion & Order.

DATE this 29th day of May, 2009.

LARRY J. McKINNEY, JUDGE
United States District Court
Southern District of Indiana

Laura A. Briggs, Clerk

BY: _____
Deputy Clerk, U. S. District Court

Distribution attached.

Distributed to:

Scott R. Alexander
Taft Stettinius & Hollister LLP
salexander@taftlaw.com

Kevin P. Auerbacher
State of New Jersey
Dept. of Law & Public Safety
auerbkev@law.dol.lps.state.nj.us

Thomas Andrew Benson
U.S. Department of Justice,
Environmental Enforcement
thomas.benson@usdoj.gov

Meghan Delaney Berroya
Sidley Austin LLP
mberroya@sidley.com

Samuel B. Boxerman
Sidley Austin LLP
sboxerman@sidley.com

Phillip Brooks
U.S. Department of Justice
phillip.brooks@usdoj.gov

Jayna Morse Cacioppo
Taft Stettinius & Hollister LLP
jcacioppo@taftlaw.com

Robert R. Clark
Taft Stettinius & Hollister LLP
rclark@taftlaw.com

Larry Martin Corcoran
U.S. Department of Justice,
Environmental & Natural Resources Div.
larry.corcoran@usdoj.gov

Michael E. DiRienzo
Kahn Dees Donovan & Kahn
mdirienzo@kddk.com

Jason A. Dunn
U.S. Department of Justice
jason.dunn@usdoj.gov

Steven David Ellis
U.S. Department of Justice,
Environment & Natural Resources
steven.ellis@usdoj.gov

Julie L. Ezell
Duke Energy Legal Department
julie.ezell@duke-energy.com

Cynthia Marie Ferguson
U.S. Department of Justice,
Environment & Natural Resources
cynthia.ferguson@usdoj.gov

Myles E. Flint II
U.S. Department of Justice
myles.flint@usdoj.gov

Richard Mark Gladstein
U.S. Department of Justice
richard.gladstein@usdoj.gov

Thomas Charles Green
Sidley Austin LLP
tcgreen@sidley.com

R. Keith Guthrie
Attorney at Law
kgmail@comcast.net

Sarah Dale Himmelhoch
U.S. Department of Justice
sarah.himmelhoch@usdoj.gov

Eugene J. Kelly Jr.
New York State Attorney General
eugene.kelly@oag.state.ny.us

Thomas E. Kieper
United States Attorney's Office
tom.kieper@usdoj.gov

Jung W. Kim
New Jersey Office
of the Attorney General
jung.kim@dol.lps.state.nj.us

James A. King
Porter Wright Morris & Arthur LLP
jking@porterwright.com

Joseph M. Kowalczyk
New York State Office
of the Attorney General
joseph.kowalczyk@oag.state.ny.us

Jonathan F. Lewis
Clean Air Task Force
jlewis@catf.us

James A. Lofton
U.S. Department of Justice
jim.lofton@usdoj.gov

Jennifer Anne Lukas-Jackson
U.S. Department of Justice
jennifer.lukas-jackson@usdoj.gov

Jon C. Martin
State of New Jersey
jon.martin@dol.lps.state.nj.us

Kimberly P. Massicotte
Office of the Attorney General
kimberly.massicotte@po.state.ct.us

Dean M. Moesser
Duke Energy Corporation
dmmoesser@duke-energy.com

Carmel Alicia Motherway
Connecticut Attorney General
carmel.motherway@po.state.ct.us

Michael Joseph Myers
New York State Department of Law
michael.myers@oag.state.ny.us

John D. Papageorge
Taft Stettinius & Hollister LLP
jpapageorge@taftlaw.com

Crissy Lyn Pellegrin
Environmental Protection Agency
pellegrin.crissy@epa.gov

Loren A. Remsberg
U.S. Department of Justice/ ENRD/EES
loren.remsberg@usdoj.gov

Robert T. Rosenthal
New York Attorney General's Office
robert.rosenthal@oag.state.ny.us

Jeffrey K. Sands
U.S. Department of Justice
jeffrey.sands@usdoj.gov

Justin Aaron Savage
U.S. Department of Justice
justin.savage@usdoj.gov

J. Jared Snyder
Office of the Attorney General
jared.snyder@oag.state.ny.us

Kosta S. Stojilkovic
Sidley Austin LLP
kstojilkovic@sidley.com

Katherine Lynn Vanderhook
U.S. Department of Justice
katherine.vanderhook@usdoj.gov

Gaylene Vasaturo
United States Environmental Protection
Agency
vasaturo.gaylene@epa.gov

Frank R. Volpe
Sidley Austin LLP
fvolpe@sidley.com

United States District Court, Northern District of Illinois

Name of Assigned Judge or Magistrate Judge	John W. Darrah	Sitting Judge if Other than Assigned Judge	
CASE NUMBER	09-cv-5277	DATE	11/03/11
CASE TITLE	U.S., et al. v. Midwest Generation		

DOCKET ENTRY TEXT

Plaintiff's Unopposed Motion for Certification of Partial Final Judgment and Staying of Remaining Claims [157] is granted. See statement below. No appearance is necessary on 11/10/11.

■[For further details see text below.]

Docketing to mail notices.

STATEMENT

On September 14, 2011, Plaintiffs filed their Unopposed Motion for Certification of Partial Final Judgment and to Stay Remaining Claims. Plaintiffs seek to obtain final judgment under Rule 54(b) only on the Prevention of Significant Deterioration ("PSD") claims that have already been dismissed by this Court (see Orders issued on March 9, 2010, and March 16, 2011). The matter has been fully briefed.

A grant of partial final judgment is governed by Federal Rule of Civil Procedure 54(b). Rule 54(b) provides "[w]hen an action presents more than one claim for relief . . . the court may direct entry of a final judgment as to one or more, but fewer than all, claims or parties only if the court expressly determines that here is no just reason for delay." Fed. R. Civ. P. 54(b). The Court must ascertain that any claim receiving final judgment is separate from any remaining claims in that "all of one party's claims or rights have been fully adjudicated" or "when a distinct claim has been fully resolved with respect to all parties." *Factory Mut. Ins. Co. V. Bobst Group USA, Inc.*, 392 F.3d 922, 924 (7th Cir. 2004).

In the instant case, the motion for partial judgment on the dismissed PSD claims is unopposed by the remaining Defendant, Midwest Generation, LLC, provided a stay is entered on the remaining claims. A stay of these claims is an appropriate course that would encourage the efficiencies Rule 54(b) dictates. Based on the submissions by the parties, it appears final judgment on the dismissed claims, coupled with a stay pending appeal on the remaining claims, could avoid duplicative discovery, motion practice, and trials, and therefore promote the efficiency and fairness required under Rule 54(b). Plaintiffs' Motion for Certification of Partial Final Judgment and to Stay Remaining Claims is granted.